

***United States Court of Appeals
for the Second Circuit***



APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
UNITED STATES OF AMERICA,

Plaintiff-Appellee

-against-

ROBERT A. RYAN

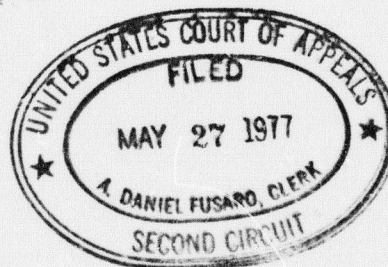
Defendant-Appellant
-----X

Docket No. 77-1194

B
P/S

APPENDIX

MICHAEL IRA ASEN
Attorney for Defendant-Appellant
217 Broadway
Suite 404
New York, New York 10007



PAGINATION AS IN ORIGINAL COPY

FELONY Fel ☒ 207 1 District Office

ROBERT A. RYAN
(LAST, FIRST, MIDDLE)

ALASER

7 27 76 476
No. of Defs * 1 Yr Docket No

U.S. TITLE/SECTION

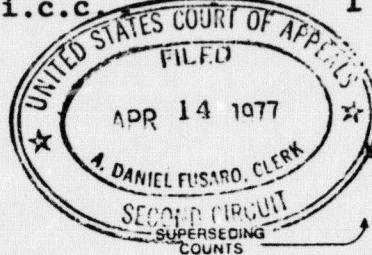
18-659 & 2

OFFENSES CHARGED

Theft of goods in i.c.c.

ORIGINAL COUNTS

1



U.S. MAG. CASE NO. 76 M

BAIL - RELEASE

AMT ☐ Full ☐ Partial
Set ☐ OR ☐ PS
\$ 000
Date ☐ 10% ☐ Sur.
☐ Bail Not Made ☐ Coll.
☐ Status Changed (See Docket) ☐ 3rd Pny C.

II. KEY DATES & INTERVALS

ARREST or	INDICTMENT ☒	ARRAIGNMENT	TRIAL
U.S. Custody Began	High Risk Date	Information ☐	Trial Set For
Summons Served	Indict. Waived ☐	1st Plea	Voir Dire ☐
First Appearance	In Charging District	Superseding Indict/Info ☐	Trial Began ☐
6-10-76	2/8/77	Final Plea	Trial Ended 2.11.77

Disposition of Charges
☒ Convicted ☐ On /
☐ Acquitted ☐ On L
☐ Dismissed ☐ Offe
☐ On Government Motion

MAGISTRATE		INITIAL/NO.	OUTCOME
Search Warrant Issued	DATE	INITIAL APPEARANCE DATE	☐ DISMISS
Summons Issued	DATE	PRELIMINARY EXAMINATION OR REMOVAL HEARING	☒ HELD FOR GJ OR OTHER PCEEDING IN THIS DISTRICT
Arrest Warrant Issued	DATE	☒ WAIVED ☐ NOT WAIVED	☐ HELD FOR GJ OR OTHER PCEEDING IN DISTRICT BELC
COMPLAINT	6-10-76 ASC/070B	Tape Number	
OFFENSE (In Complaint)	Possession of stolen goods / Interstate Shipment. T-18 USC S		

U.S. Attorney or Asst

ATTORNEYS

Defense ☐ CJA ☐ Ret. ☐ Waived ☐ Self ☐ None / Other ☒ O.C.

Brewster- Stanley Teitler
X 7029

LAS - Michael Asen, Esq.
217 Broadway,
New York, New York
(212) 283-0901

* Show last names and suffix numbers of other defendants on same indictment/information

DATE	DOCUMENT NO.	PROCEEDINGS	EXCLUD BLE
7-27-76		Before DOOLING J - Indictment filed	
8/5/76		Before PRATT, J.- Case called- Deft and counsel present- Deft arraigned and after being advised of his rights and on his own behalf enters a plea of not guilty- Bail cont'd Adj'd without date before Judge Bramwell	
11-5-76		Notice of Readiness for Trial - filed.	
12-28-76		Notice of Readiness for Trial filed.	
1-14-77		Before Bramwell, J.- Case Called. Deft. & Counsel present. Case adjd. to 1-26-77 at 10:00 A.M. for Trial. Deft. in open Court waives Speedy Trial Rule.	
1-14-77		Notice of Appearance filed.	
1.26.77		Before Bramwell, J.- Case Called. Deft. Present with Counsel. Deft. waives Speedy Trial rule. Case adjd. to 2.9.77 at 10:00 A.M. for Trial.	
2-8-77		Waiver of speedy trial form filed.	
2-8-77		Before Bramwell, J - case called - deft & counsel M. Asen present - selection of Jurors begun - trial adjd to 2-9-77	

By: Lee Smith
DEPUTY CLERK

Before CATOGGIO, J - SUPERSADING INDICTMENT FILED (S)
Before BRAMWELL, J - case called - deft & atty present -
Hearing on motion to suppress begun (Jury not present)
both sides rest - defts motion to suppress is denied -
motion to suppress concluded - trial resumed at 12 Noon
Jury sworn - defts motion for mistrial is denied - trial
contd to 2-10-77.

-10-77 Before BRAMWELL, J - case called - deft & counsel M. Asen
present - trial resumed - Govt rests - defts motion
for judgment of acquittal pursuant to Rule 29 etc. and to
dismiss the indictment - decision reserved. defts motion
for judgment of acquittal - Motion denied - trial contd
to 2-11-77 at 2:00 PM.

-11-77 ~~xxx~~ Motion for Judgment of acquittal filed
-11-77 Defts requests to charge filed

.11.77 Before Bramwell, J.- Case Called. Deft. & Counsel present.
Trial resumed. Deft's. motion for Judgment of Acquittal
is denied. Jury Came into Court at 6:40 P.M. and rendered
a verdict of GUILTY as Charged. Jury polled. Jury discharged.
Deft's. motion to set aside verdict is denied. Deft. to
report to Probation Office on 2.14.77 at 10:00 A.M.
Trial concluded.

.11.77 Two Stenographer's Transcripts dated February 9, 1977 filed.

~~XX~~
~~3-19-77 Notice of appeal filed XXX~~
~~XX~~

5/77 Before BRAMWELL, J. - Case called. Deft & Counsel present.
Deft sentenced to imprisonment for a period of 5 years
as charged. Execution of sentence is suspended and deft
placed on probation for 5 years. Special condition of
probation, that if deemed necessary the Prob. Dept the
deft shall receive treatment for alcoholic addiction. Deft
advised of his right to appeal. On motion of AUSA Teitler
the original indictment is dismissed. Motion granted.

2/25/77 Judgment & Order of probation filed. Certified copies to Prob.

2/25/77 Notice of appeal filed.

5/77 Docket entries and duplicate of Notice of Appeal mailed to
the C of A.

4-13-77 Record on appeal certified and mailed to the court of appeals

A TRUE COPY	
ATTEST	
DATED	4/13 1977
LEWIS ORCEL	
CLERK	
BY	<u>[Signature]</u>
DEPUTY CLERK	

FINE AND RESTITUTION PAYMENTS			
DATE	RECEIPT NUMBER	C.D. NUMBER	C.D. NUMBER

B. NARA Ex-
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U.S.C. 224
C. State or F.
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D. Interlocu-
Appeals
E. Hearings
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F. Transfers
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316(h)(1)
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316(h)(1)

United States of America vs.

FILED

United States District Court for

FILED

EASTERN DISTRICT OF NEW YORK

DEFENDANT

ROBERT A. RYAN

DOCKET NO.

76 CR 478 (S)

JUDGMENT AND PROBATION/COMMITMENT ORDER

AO-245 (6/74)

In the presence of the attorney for the government
the defendant appeared in person on this date

MONTH
3

DAY
25

YEAR
77

COUNSEL

☐ WITHOUT COUNSEL

However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ WITH COUNSEL

Michael Asen, Esq. Legal Aid Society

(Name of counsel)

PLEA

☐ GUILTY, and the court being satisfied that
there is a factual basis for the plea,

☐ NOLO CONTENDERE,

☐ NOT GUILTY

There being a finding/verdict of

☐ NOT GUILTY. Defendant is discharged

☒ GUILTY.

FINDING &
JUDGMENT

Defendant has been convicted as charged of the offense(s) of violating T-18, U.S.C., Section 659 and 2 in that on or about the 10th day of June 1976, the defendant did knowingly, wilfully and unlawfully receive and have in his possession approximately fifty (50) bags of coffee, having a value in excess of \$100.00, which goods had been stolen from Pier 6 of the Bush Marine Terminal while moving as a part of and constituting a foreign shipment of freight from Guatemala and Honduras to New York, the defendant knowing the same to have been stolen.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

SENTENCE
OR
PROBATION
ORDER

5 years as charged. Execution of sentence is suspended and defendant is placed on probation for a period of 5 years. Special condition of probation, that if deemed necessary by the Probation Department, the defendant shall receive treatment for Alcoholic addiction. On motion of Assistant United States Attorney, Stanley Teitler, the original indictment is dismissed.

SPECIAL
CONDITIONS
OF
PROBATION

FILED
IN CLERK'S OFFICE
U. S. DISTRICT COURT E.D. N.Y.

★ MAR 25 1977 ★

TIME A.M.

P.M.

ADDITIONAL
CONDITIONS
OF
PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT
RECOMMEN-
DATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY

☒ U.S. District Judge

☐ U.S. Magistrate

Henry Bramwell

Date

3/25/77

TRP:SAT:mt
F. #771,177

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
CLERK'S OFFICE
U.S. DISTRICT COURT E.D. N.Y.

★ FEB 8 1977 ★
UNITED STATES OF AMERICA
TIME A.M.
P.M.

SUPERSEDING
INDICTMENT

- against -

Cr. No. 76 CR 478(S)

ROBERT A. RYAN,

Defendant.

----- X

THE GRAND JURY CHARGES:

On or about the 10th day of June, 1976, within the Eastern District of New York, the defendant, ROBERT A. RYAN, did knowingly, wilfully and unlawfully receive and have in his possession approximately fifty (50) bags of coffee, having a value in excess of One Hundred Dollars (\$100.00), which goods had been stolen from Pier 6 of the Bush Marine Terminal, Brooklyn, New York, while moving as a part of and constituting a foreign shipment of freight from Guatemala and Honduras to New York, the defendant, ROBERT A. RYAN, knowing the same to have been stolen. (Title 18, United States Code, Section 659 and Section 2).

A TRUE BILL.

Louis Gonzalez
FOREMAN.

David G. Trager
DAVID G. TRAGER
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

(The jury entered the courtroom at 3:50 p.m.)

THE COURT: Mr. Foreman, ladies and gentlemen of the jury:

We now come to the final stage of the proceedings. The Court will now charge you on the law to be applied to the facts in the case.

As you may recall, I initially gave you a pre-charge as to the manner in which the case would be presented to you. I told you that most of the evidence in the case would be presented to you. I told you that most of the evidence in the case would come in the form of the testimony of witnesses, and that you were to pay special attention to the manner in which the witnesses testified.

I believe I also instructed you that you would be the judges of the facts in the case, that being your sole province; and that your recollection of the facts after having heard all of the evidence in the case -- the testimony of witnesses and the documentary proof -- was to control the determination of the issue.

Likewise at that time I told you that I would be the judge of the law. This has not changed at this stage of the proceedings. I will not review the facts in this case for you because I am certain that with summations

1
2 by the attorneys there is no need for the Court to
3 review the facts. In any event, if you find that there
4 is some fact in the case that you may have forgotten
5 or don't recollect, or you can't agree with each other
6 in your deliberations, you can have it read back from
7 the record, and that will, I am sure, refresh your
8 memory.

9 In any event, I am the judge of the law. You
10 must accept what I say to be the law in this case.

11 Now, the attorneys have been permitted by the
12 Court and by the rules to make opening statements and
13 summations to you. Under no circumstances are the
14 statements they have made by way of opening or by way
15 of summation to be taken as evidence. However, the
16 Court and the law does permit you to take the
17 arguments that they have proffered before you and
18 weigh those arguments. And if you agree with what they
19 have said on either side of the case you may use those
20 arguments in your deliberations and in discussing the
21 case with each other, and try to convince one another
22 as to what the final determination shall be with
23 reference to the deliberations at hand.

24 If you feel that the arguments are not
25 commensurate with the testimony and the proof in the

1
2 case, you may disregard them. The arguments are not
3 evidence. You need not weigh them. However, there are
4 times when the arguments of the attorneys will give you
5 an insight as to something you may have missed, and
6 you may discuss that portion of it if you so desire.

7 Now, of course, I also said to you that during
8 the trial the Court will be the judge of the law.
9 Likewise, as to motions which at times we had at a side
10 bar, as you may recall. That was not for the purpose
11 of keeping any of the proof from you, but were
12 matters of law that were discussed between the attorneys
13 and the Court itself and should not have come before
14 you. In any event, if you feel that you have
15 discovered by some stretch of your imagination what
16 this Court thinks as to either some of the testimony
17 or the case itself, you should remove that from your
18 mind because I tell you here and now I have come to no
19 conclusion in this case nor have I indicated to you in
20 any way whatsoever what my feeling is with reference
21 to the facts in the case or with reference to the
22 guilt or innocence of the defendants. That is your
23 province and your job. You should not try to weigh
24 what you believe the Court's impression may be.

25 You must understand that the lawyers who appear

1
2 before you are advocates. They are advocating the
3 best case they can for the parties they represent and
4 they have a right to exercise as much forcefulness as
5 they desire in their questioning or otherwise in
6 presenting their case. I say this because this is
7 within the framework of the ordinary trial.

8 It is the duty of the attorney on each side of
9 a case to object when the other side offers testimony
10 or other evidence which the attorney believes is not
11 properly admissible. You should not show prejudice
12 against an attorney or his client because the attorney
13 has made objections.

14 Upon allowing testimony or other evidence to be
15 introduced over the objection of an attorney, the Court
16 does not, unless expressly stated, indicate any opinion
17 as to the weight or effect of such evidence. As
18 stated before, the jurors are the sole judges of the
19 credibility of all witnesses and the weight and effect
20 of all evidence.

21 When the Court has sustained an objection to a
22 question addressed to a witness the jury must disregard
23 the question entirely, and may draw no inference from
24 the wording of it, or speculate as to what the witness
25 would have said if he had been permitted to answer any

1
2 question.

3 No statement, ruling, remark or comment which
4 I made during the course of the trial was intended to
5 indicate my opinion as to how you should decide the
6 case or to influence you in any way in your
7 determination of the facts. If at any time I made any
8 comment regarding the facts you are at liberty to
9 disregard it. At times, I asked questions of the
10 witnesses. When I did so, it was for the purpose of
11 bringing out matters which I felt should be brought out,
12 and not in any way to indicate my opinion about the
13 facts or to indicate the weight I felt you should
14 give to the testimony of the witnesses. Also, you
15 should not now show prejudice toward a lawyer or his
16 client because I found it necessary to admonish the
17 lawyer during the course of the trial. It is the duty
18 of the Court to admonish an attorney who, out of zeal
19 for his cause, does something which is not in keeping
20 with the rules of evidence or procedure. You are to
21 draw no inference against the side to whom an
22 admonition of the Court may have been addressed
23 during the trial of this case.

24 In determining the facts, the jury is reminded
25 that before each member was accepted and sworn to act

1
2 as a juror, he was asked questions regarding his
3 competency, qualifications, fairness and freedom from
4 prejudice or sympathy. On the faith of those answers,
5 the juror was accepted by the parties. Therefore,
6 those answers are as binding on each of the jurors now
7 as they were then and should remain so until the jury
8 is discharged from consideration of this case.

9 You cannot decide that you do not like the
10 sections of the law that I will quote to you or any
11 other part of the charge. You have the obligation of
12 accepting the law as I charge it, just as I have the
13 obligation of accepting your findings of fact in your
14 ultimate verdict as to the guilt or innocence of each
15 defendant as to each charge.

16 It lends for predictability and stability if
17 judges throughout the country in types of charges such
18 as this, charge uniformly or substantially so and
19 that juries accept it. It would be unfair for you to
20 decide this case on your own notions on what the law
21 should be, and another jury decided on their own notions
22 on what the law should be.

23 That is why the obligation is a firm one and
24 one that you should understand.

25 Of course, you know by this time that this case

1 has come before you by way of an indictment presented
2 by a Grand Jury sitting in this Eastern District.
3 That indictment charges the defendant with the
4 count I shall now read to you. Remember, the
5 indictment is merely an accusation, merely a piece of
6 paper. It is not evidence and is not proof of
7 anything.
8

9 The indictment reads as follows:

10 On or about the 10th day of June, 1976,
11 within the Eastern District of New York, the defendant,
12 Robert A. Ryan, did knowingly, wilfully and unlawfully
13 receive and have in his possession approximately
14 fifty (50) bags of coffee, having a value in excess
15 of one hundred dollars (\$100.00), which goods had been
16 stolen from Pier 6 of the Bush Marine Terminal,
17 Brooklyn, New York, while moving as a part of and
18 constituting a foreign shipment of freight from
19 Guatemala and Honduras to New York, the defendant.
20 Robert A. Ryan, knowing the same to have been stolen,
21 (Title 18, United States Code, Section 659 and
22 Section 2.)

23 The count presented in the indictment before
24 you is based on Title 18 of the United States Code,
25 Section 659 and Title 18 of the United States Code,

1
2 Section 2.

3 The first paragraph of Section 659 of Title 18
4 of the United States Code provides as follows:

5 "Whoever steals, or unlawfully takes, or
6 carries away from any storage facility, platform, or
7 wharf, with intent to convert to his own use, any
8 goods or chattels moving as or which are a part of
9 or which constitute a foreign shipment of freight,"
10 commits an offense against the laws of the United
11 States.

12 The count of the indictment in this case is
13 brought under paragraph 2 of Section 659 which refers
14 back to the first paragraph which I just quoted, and
15 reads in pertinent part as follows:

16 "Whoever buys or receives or has in his
17 possession any such goods or chattels, knowing the same
18 to have been stolen" commits an offense against the
19 laws of the United States.

20 You are instructed as a matter of law that
21 the guilt of a defendant may be established without
22 proof that he personally did every act constituting
23 the offense charged.

24 Section 2 of Title 18 of the United States
25 Code deals with the aiding and abetting of the

1 commission of an offense against the laws of the
2 United States. Section 2 provides in pertinent part
3 as follows:
4

5 "Whoever commits an offense against the
6 United States, or aids, abets, counsels, commands,
7 induces, or procures its commission, is punishable
8 as a principal.

9 "Whoever willfully causes an act to be done,
10 which if directly performed by him or another would
11 be an offense against the United States is
12 punishable as a principal."

13 In other words, a person who willfully
14 participates in the commission of a crime may be
15 found to be guilty of that offense. Participation is
16 willful if done voluntarily and intentionally, and
17 with the specific intent to do something the law
18 forbids, or with the specific intent to fail to do
19 something the law requires to be done; that is to
20 say, with bad purpose either to disobey or to
21 disregard the law.

22 In order to aid and abet another to commit a
23 crime it is necessary that the accused willfully
24 associate himself in some way with the criminal
25 venture, and willfully participate in it as he would

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2 in something he wishes to bring about; that is to
3 say, that he willfully seek by some act or omission of
4 his to make the criminal venture succeed.

5 An act or omission is "willfully" done if done
6 voluntarily and intentionally and with the specific
7 intent to do something the law forbids, or with the
8 specific intent to fail to do something the law
9 requires to be done; that is to say, with bad purpose
10 either to disobey or to disregard the law.

11 You of course may not find any defendant
12 guilty unless you find beyond reasonable doubt that
13 every element of the offense as defined in these
14 instructions was committed by some person or persons,
15 and that the defendant participated in its commission.

16 In order to cause another person to commit a
17 criminal act, it is necessary that the accused
18 willfully do, or willfully fail to do, something which,
19 in the ordinary course of the business or employment of
20 such other person, or by reason of the ordinary course
21 of nature or the ordinary habits of life, results in
22 other persons either doing something the law forbids,
23 or failing to do something the law requires to be done.

24 An act or a failure to act is "willfully" done,
25 if done voluntarily and intentionally, and with the

1
2 specific intent to do something the law forbids, or
3 with the specific intent to fail to do something the
4 law requires to be done; that is to say, with bad
5 purpose either to disobey or to disregard the law.

6 Mere presence at the scene of the crime and
7 knowledge that a crime is being committed are not
8 sufficient to establish that the defendant aided and
9 abetted the crime, unless you find beyond reasonable doubt
10 that the defendant was a participant and not merely a
11 knowing spectator.

12 To determine whether a defendant aided and
13 abetted the commission of an offense, you ask yourselves
14 these questions: Did he associate himself with the
15 venture? Did he participate in it as something he
16 wished to bring about? Did he seek by his action to
17 make it succeed? If he did, then he is an aider and
18 abettor.

19 In order to find the defendant guilty of the
20 crime charged in the count of the indictment you must
21 find the following elements beyond a reasonable doubt:

22 First: That the bags of coffee were stolen from
23 Pier 6 of the Bush Marine Terminal, Brooklyn, New York;

24 Second: That at the time of the theft, the bags
25 of coffee were moving as a part of and constituted a

1
2 foreign shipment of freight from Guatemala and
3 Honduras to New York;

4 Third: That the defendant did receive and
5 have in his possession the bags of coffee described
6 in the indictment;

7 Fourth; That the defendant did receive and
8 have in his possession the bags of coffee described in
9 the indictment knowing them to have been stolen;

10 Fifth: That the defendant committed the
11 aforementioned acts knowingly, willfully and unlaw-
12 fully;

13 Sixth: That the bags of coffee had a value in
14 excess of \$100.

15 You are reminded that in considering each of
16 the essential elements of the crime charged in the
17 indictment, that whoever aids, abets, counsels,
18 commands, induces or procures the commission of an
19 offense against the laws of the United States is
20 punishable as a principal. In order to aid or abet
21 the commission of an offense against the laws of the
22 United States, a person must associate himself with
23 the criminal venture, participate in it, and try to
24 make it succeed.

25 As stated before, the burden is always upon

1
2 the prosecution to prove beyond a reasonable doubt
3 every essential element of the crime charged.

4 Always bear in mind that the law never imposes
5 upon a defendant in a criminal case the burden or
6 duty of calling any witnesses or producing any
7 evidence.

8 The foreign character of the property stolen is
9 an essential element of this offense. The property
10 must either be moving in or be a part of a foreign
11 shipment at the time of the receipt and possession of
12 the stolen property.

13 Property is in foreign commerce if its movement
14 originates in one country and passes through another
15 country even though it returns to the country from
16 which it started.

17 The foreign character of the shipment commences
18 when the property is segregated for foreign shipment
19 and comes into the possession of those who are
20 assisting its course in foreign transportation, and
21 continues until the property arrives at its destination
22 and is there delivered.

23 Section 659 of Title 18 of U.S.C.A. further
24 provides that:

25 "To establish the foreign...commerce character

1
2 of any shipment...the waybill or other shipping
3 document of such shipment shall be prima facie
4 evidence of the place from which and to which such
5 shipment was made."

6 "Prima facie evidence" means sufficient evidence,
7 unless outweighed by other evidence in the case. In
8 other words, waybills, or bills of lading, or other
9 shipping documents such as invoices, if proved, are
10 sufficient to show the foreign commerce character of the
11 shipment, in the absence of evidence in the case which
12 leads the jury to a different or contrary conclusion.

13 With regard to deciding whether the goods in
14 question were moving as or were a part of or
15 constituted a foreign shipment, I charge you that goods
16 intended by a shipper to be shipped to another country
17 become part of foreign commerce as soon as they have
18 finally left the shipper's possession, and come into
19 the possession of the carrier who is to forward them
20 on such journey.

21 The law is that an article once placed in
22 foreign commerce continues in foreign commerce until
23 the carrier or carriers have completely surrendered
24 their control over the article and the article has
25 come into the exclusive possession of the consignee.

1
2 This is so even though the article may be destined
3 to pause here and there along the way.

4 It is not necessary for you to find that the
5 defendant knew the goods were moving in foreign
6 commerce when they were stolen. It is sufficient if
7 he knew that the property was stolen. In determining
8 whether the defendant had such knowledge, you should
9 consider all the facts and circumstances in the case.

10 The fact of knowledge may be established by
11 direct or circumstantial evidence just as any other
12 fact in the case. One may not fillfully and
13 intentionally remain ignorant of a fact important and
14 material to his conduct, and thereby escape punishment.
15 The defense of lack of knowledge is not available to a
16 defendant if the jury finds from all the evidence
17 beyond a reasonable doubt that the defendant had a
18 conscious purpose to avoid enlightenment by closing his
19 eyes to the facts which should have caused him to
20 investigate.

21 In addition to considering other factual circum-
22 stances on the question of the defendants' allegedly
23 guilty knowledge, if you find beyond a reasonable
24 doubt that the defendant was in possession of bags of
25 coffee which had been recently stolen, you may, but
need not, infer from that fact alone that the defendant

1
2 knew that the bags of coffee in question were stolen.

3 The rationale behind this inference is that
4 possession of the fruits of the crime shortly after
5 its commission justifies the inference that the
6 possession is guilty possession, and though only prima
7 facie evidence of guilt, it may be of controlling
8 weight unless explained by the circumstances or
9 accounted for in some way consistent with innocence.

10 It is obvious that as to the charge contained
11 in the indictment, one of the critical questions is
12 whether the defendant knew he had possession of bags
13 of coffee which had been stolen. Actual knowledge by
14 the defendant that he had received and then possessed
15 stolen bags of coffee is one of the essential elements
16 of the offense charged.

17 You may not find the defendant guilty unless
18 you find beyond a reasonable doubt that he knew that
19 he received and was then in possession of stolen
20 merchandise. The fact of knowledge may be established
21 by direct or circumstantial evidence just as any other
22 fact in the case. Knowledge may be proven by the
23 defendant's conduct since we have no way of looking
24 into a person's mind directly.

25 Bear in mind that one may not willfully and

L

1 intentionally remain ignorant of a fact, important
2 and material to his conduct, in order to escape the
3 consequences of the criminal law.
4

5 If you find from all the evidence beyond a
6 reasonable doubt that the defendant believed that he
7 received and was then in possession of stolen bags of
8 coffee, and deliberately and consciously tried to
9 avoid learning that the bags of coffee in question were
10 stolen, in order to contend, should he be apprehended,
11 that he did not know, you may treat this deliberate
12 avoidance of positive knowledge as the equivalent of
13 knowledge.

14 In other words, you may find the defendant acted
15 knowingly if you find that either he actually knew he
16 had received and possessed stolen bags of coffee, or
17 that he deliberately closed his eyes to what he had
18 every reason to believe was the fact.

19 I should like to emphasize, ladies and
20 gentlemen, that the requisite knowledge cannot be
21 established by demonstrating merely negligence or
22 even foolishness on the part of the defendant.

23 You will always bear in mind that the law
24 never imposes upon a defendant in a criminal case the
25 burden or duty of calling any witnesses or producing

1 any evidence.
2

3 If you, the Jury, find beyond a reasonable doubt
4 that the defendant was in possession of recently
5 stolen property, then it is your exclusive province
6 to determine whether the facts and circumstances
7 shown by the evidence in the case warrant any
8 inference which the law permits you to draw from
9 possession of recently-stolen property. If any
10 possession the defendant may have had of recently-
11 stolen property is consistent with innocence, or if
12 you entertain reasonable doubt of guilt, you must
13 acquit the defendant.

14 The Government must establish the value of the
15 property stolen because the law provides a greater
16 penalty if the value of the property exceeds \$100.
17 Value under this statute means face, par or market value,
18 or cost price, either wholesale or retail, whichever
19 is greater. The value of the property stolen is a
20 question of fact to be determined by the jury. In
21 order to authorize the greater penalty, the
22 Government must establish beyond a reasonable doubt
23 that the value of the property exceeds \$100.

24 You are instructed that the defendant's
25 knowledge or belief with respect to the value of the
goods is wholly irrelevant.

1
2 If the goods involved were a part of or
3 constituted a foreign shipment of freight or express,
4 and the accused unlawfully, knowingly and willfully
5 received and had in his possession approximately 50 bags
6 of coffee having a value in excess of \$100.00, which
7 goods had been stolen from Pier 6 of the Bush Marine
8 Terminal; as alleged in the indictment, then the
9 offense charged was complete, even though the goods
10 were later recovered.

11 Please bear in mind the following definitions
12 in considering the essential elements of the crime
13 charged:

14 The law recognizes two kinds of possession:
15 actual possession and constructive possession. A
16 person who knowingly has direct physical control over
17 a thing, at a given time, is then in actual possession
18 of it.

19 A person who, although not in actual possession,
20 knowingly has the power at a given time to exercise
21 dominion or control over a thing, is then in
22 constructive possession of it.

23 The law recognizes also that possession may be
24 sole or joint. If one person has actual or constructive
25 possession of a thing possession is sole. If two or

1
2 more persons share actual or constructive possession of
3 a thing their possession is joint. If you find from the
4 evidence beyond a reasonable doubt that the defendant,
5 either alone or with others, had actual or constructive
6 possession of the bags of coffee described in the
7 indictment, then you may find that the bags of coffee
8 were in the possession of the defendant within the
9 meaning of the word "possession" as used in these
10 instructions. Actual manual or personal possession
11 is not a necessary element of the crime, it is
12 sufficient if the possession is constructive, if the
13 merchandise is shown to be under the control of the
14 person charged though in actual physical possession of
15 another. The Government does not have to prove that
16 the bags of coffee were possessed by the defendant
17 from the time that they were stolen or, indeed, for
18 any particular length of time.

19 "Stolen" means acquired, or possessed, as a
20 result of some wrongful or dishonest act or taking,
21 whereby a person willfully obtains or retains possession
22 of property which belongs to another, without or
23 beyond any permission given, and with the intent to
24 deprive the owner of the benefit of ownership.

25 An act is done knowingly if done voluntarily and

1
2 intentionally, and not because of mistake or accident
3 or other innocent reason.

4 The purpose of adding the word "knowingly" was
5 to insure that no one would be convicted for an act
6 done because of mistake or accident, or other innocent
7 reason.

8 An act is done "willfully" if done voluntarily
9 and intentionally, and with the specific intent to do
10 something the law forbids; that is to say, with bad
11 purpose either to disobey or to disregard the law.

12 "Unlawfully" means contrary to law. So, to do
13 an act "unlawfully" means to do willfully something
14 which is contrary to law.

15 The crime charged in this case is a serious
16 crime which requires proof of specific intent before a
17 defendant can be convicted. Specific intent, as the
18 term implies, means more than the general intent to
19 commit the act. To establish specific intent, the
20 government must prove that a defendant knowingly did
21 an act which the law forbids, purposely intending to
22 violate the law. Such intent may be determined from
23 all the facts and circumstances surrounding the case.

24 Intent ordinarily may not be proved directly,
25 because there is no way of fathoming or scrutinizing

1 the operations of the human mind. But you may infer
2 the defendant's intent from the surrounding circum-
3 stances. You may consider any statement made and act
4 done or omitted by a defendant, and all other facts
5 and circumstances in evidence which indicates his state
6 of mind.
7

8 Now, there are in any case, and in this one,
9 two types of evidence from which a jury may properly
10 find a defendant guilty of a crime; one is direct
11 evidence such as testimony of an eyewitness, the other
12 is circumstantial evidence which is proof of a chain
13 of facts and circumstances pointing to the commission
14 of the offense.

15 As a general rule, the law makes no distinction
16 between direct and circumstantial evidence, but simply
17 requires that before convicting a defendant the jury
18 must be satisfied of the defendant's guilt beyond a
19 reasonable doubt from all the evidence in the case.

20 A defendant is presumed innocent of the crime.
21 Thus, the defendant, although accused, begins the trial
22 with a clean slate and with no evidence against him,
23 and the law permits nothing but legal evidence to be
24 presented before a jury to be considered in support of
25 any charge against the accused, so that the presumption

1
2 of innocence alone is sufficient to acquit a defendant
3 unless you, the jury, are satisfied beyond a reason-
4 able doubt of the defendant's guilt after careful and
5 impartial consideration of all the evidence in the
6 case.

7 It is not required that the Government prove
8 guilt beyond all possible doubt. The test is one of
9 reasonable doubt, and reasonable doubt is doubt based
10 upon reason and common sense, the kind of doubt that
11 would make a reasonable person hesitate to act.
12 Proof beyond a reasonable doubt must, therefore, be
13 proof of such a convincing character that you would be
14 willing to rely and act upon it unhesitatingly in the
15 most important of your own affairs.

16 You, the jury, will remember that a defendant
17 is never to be convicted on mere suspicion or
18 conjecture. The burden is always upon the prosecution
19 to prove guilt beyond a reasonable doubt. This burden
20 never shifts to a defendant. The law never imposes
21 upon a defendant in a criminal case the burden or duty
22 of calling any witnesses or producing any evidence.
23 So, if the jury views the evidence in the case as
24 reasonably permitting either or two conclusions, one
25 of innocence, the other of guilt, you, the jury, should

1 of course, adopt the conclusion of innocence.
2

3 I have said that the defendant may be proven
4 guilty either by direct or circumstantial evidence. I
5 have said that direct evidence is the testimony of one
6 who asserts actual knowledge of a fact, such as an eye-
7 witness. Also circumstantial evidence is proof of a
8 chain of facts and circumstances indicating the guilt
9 or innocence of a defendant. You, the jury, may make
10 common sense inferences from the proven facts.

11 It is not necessary that all inferences drawn
12 from the facts in evidence be consistent only with
13 guilt and inconsistent with every reasonable hypothesis
14 of innocence. The test is one of reasonable doubt,
15 and should be based upon all the evidence, the
16 testimony of the witnesses, the documents offered into
17 evidence and the reasonable inferences which can be
18 drawn from the proven facts.

19 An inference is a deduction or conclusion which
20 reason and common sense lead the jury to draw from
21 the facts which have been proved. You are to consider
22 only the evidence in the case. But in your
23 consideration of the evidence you are not limited to
24 the bald statements of the witnesses. On the contrary,
25 you are permitted to draw, from the facts which you

1 find have been proved, such reasonable inferences as
2 seem justified in the light of your own experience.
3

4 A reasonable doubt may arise not only from the
5 evidence produced, but also from a lack of evidence.
6 Since the burden is upon the prosecution to prove
7 the accused guilty beyond a reasonable doubt of
8 every essential element of the crime charged, a
9 defendant has the right to rely upon failure of the
10 prosecution to establish such proof.

11 You as jurors are the sole judges of the
12 credibility of the witnesses and the weight their
13 testimony deserves, and 't goes without saying that
14 you should scrutinize all the testimony given, the
15 circumstances under which each witness has testified,
16 and every matter in evidence which tends to show
17 whether a witness is worthy of belief. Consider each
18 witness' intelligence, motive and state of mind, and
19 his demeanor and manner while on the stand. Consider
20 the witness' ability to observe the matters as to
21 which he has testified, and whether he impresses you
22 as having an accurate recollection of these matters.
23 Consider also any relation each witness may bear to
24 either side of the case; the manner in which each
25 witness might be affected by the verdict; and the
extent to which, if at all, each witness is either

1 supported or contradicted by other evidence in the case.

2
3 Inconsistencies or discrepancies in the
4 testimony of a witness, or between the testimony of
5 different witnesses, may or may not cause the jury to
6 discredit such testimony. Two or more persons
7 witnessing an incident or a transaction may see or hear
8 it differently; and innocent misrecollection, like
9 failure of recollection, is not an uncommon experience.

10 In weighing the effect of a discrepancy, always
11 consider whether it pertains to a matter of importance
12 or an unimportant detail, and whether the discrepancy
13 results from innocent error or intentional falsehood.

14 After making your own judgment, you will give
15 the testimony of each witness such credibility, if any,
16 as you may think it deserves. Another test that you
17 can use in determining the truthfulness or credibility
18 of a witness is to use your own good common sense in
19 addition to these essentials that I have given you.
20 You can use your good common sense as you do in your
21 everyday experience where you must make important
22 decisions based upon what others tell you. When you
23 decide to either accept or ignore the statements of
24 others you use your common sense. Your good judgment
25 will say to you somehow or other that whatever they

1
2 say does not appear to be truthful, that somehow or
3 other you just do not believe what they have said. That
4 is your ability to reason, your ability to determine
5 the truthfulness of the person you are speaking with.
6 Likewise, your common sense should be used to
7 determine the weight to be given the testimony of a
8 witness.

9 You take that same good common sense into the
10 jury room, you do not leave it outside. In addition,
11 to what I have said, use your common sense as a test
12 in exercising your good judgment and in determining
13 whether or not this defendant is guilty of the crime
14 charged. It is for you to determine whether the
15 witnesses in this case have testified truthfully,
16 whether or not they have an interest in the case, what
17 that interest may be and how great it is and whether
18 or not they have an interest in the case, what that
19 interest may be and how great it is and whether or not
20 they have told you falsehoods. This is all for you
21 to determine.

22 Every witness' testimony must be weighed as
23 to its truthfulness. If you find any witness lied as
24 to any material fact in the case, then the law gives
25 you certain privileges. One of those privileges is that

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2 you have the right to disregard the entire testimony
3 of that witness. If you find, however, that you can
4 sift through that testimony and determine which of the
5 testimony is true and which was false, then the law
6 allows you to take the portions which were true and
7 weigh it and disregard those portions which were false.
8 That again is within your prerogative.

9 The weight of the evidence is not necessarily
10 determined by the number of witnesses testifying on
11 either side. You should consider all the facts and
12 circumstances in evidence to determine which of the
13 witnesses are worthy of greater credence. You may find
14 that the testimony of a smaller number of witnesses on
15 one side is more credible than the testimony of a
16 greater number of witnesses on the other side.

17 You are not obliged to accept testimony, even
18 though the testimony is uncontradicted and the witness
19 is not impeached. You may decide, because of the
20 witness' bearing and demeanor, or because of the
21 inherent improbability of his testimony, or for other
22 reasons sufficient to you, that such testimony is not
23 worthy of belief.

24 The Government is not required to prove the
25 essential elements of the offense as defined in these
instructions by any particular number of witnesses..

1
2 The testimony of a single witness may be sufficient
3 to convince you beyond a reasonable doubt of the
4 existence of an essential element of the offense
5 charged, if you believe beyond a reasonable doubt that
6 the witness is telling the truth.

7 The law does not require the prosecution to
8 call as witnesses all persons who may have been present
9 at any time or place involved in the case, or who may
10 appear to have some knowledge of the matters in issue
11 at this trial. Nor does the law require the
12 prosecution to produce as exhibits all papers and
13 things mentioned in the evidence.

14 However, in judging the credibility of the
15 witnesses who have testified, and in considering the
16 weight and effect of all evidence that has been
17 produced, the jury may consider the prosecution's
18 failure to call other witnesses or to produce other
19 evidence shown by the evidence in the case to be in
20 existence and available.

21 The jury will always bear in mind that the law
22 never imposes upon a defendant in a criminal case the
23 burden or duty of calling any witnesses or producing
24 any evidence, and no adverse inferences may be drawn
25 from his failure to do so.

1
2 Evidence that at some other time a witness
3 has said something, or has failed to say something,
4 which is inconsistent with the witness' testimony at
5 the trial, may be considered by the jury for the sole
6 purpose of judging the credibility of the witness;
7 but may never be considered as evidence or proof of
8 the truth of any such statement.

9 The testimony of a witness may be discredited
10 or impeached by showing that he previously made
11 statements which are inconsistent with his present
12 testimony. The earlier contradictory statements are
13 admissible only to impeach the credibility of the
14 witness, and not to establish the truth of these
15 statements. It is the province of the jury to
16 determine the credibility, if any, to be given the
17 testimony of a witness who has been impeached.

18 If a witness is shown knowingly to have
19 testified falsely concerning any material matter, you
20 have a right to distrust such witness' testimony in
21 other particulars; and you may reject all the testimony
22 of that witness or give it such credibility as you
23 may think it deserves.

24 An act or omission is "knowingly" done, if
25 done voluntarily and intentionally, and not because of
mistake or accident or other innocent reason.

1
2 The evidence in this case raises the question
3 of whether the defendant was in fact the criminal
4 actor and necessitates your resolving any conflict
5 or uncertainty in testimony on that issue.

6 The burden of proof is on the prosecution with
7 reference to every element of the crime charged and
8 this burden includes the burden of proving beyond
9 reasonable doubt the identity of the defendant as the
10 perpetrator of the crime charged.

11 Identification testimony is an expression of
12 belief or impression by the witness. Its value
13 depends on the opportunity the witness had to observe
14 the offender at the time of the offense and to make a
15 reliable identification later.

16 In appraising the identification testimony of
17 a witness, you should consider the following:

18 1) Are you convinced that the witness had the
19 capacity and an adequate opportunity to observe the
20 offender?

21 Whether the witness had an adequate opportunity
22 to observe the offender at the time of the offense
23 will be affected by such matters as how long or short
24 a time was available, how far or close the witness
25 was, how good were lighting conditions, whether the

1
2 witness had had occasion to see or know the person in
3 the past.

4 2) You must consider the credibility of each
5 identification witness in the same way as any other
6 witness, consider whether he is truthful, and consider
7 whether he had the capacity and opportunity to make a
8 reliable observation on the matter covered in his
9 testimony.

10 I again emphasize that the burden of proof on
11 the prosecutor extends to every element of the crime
12 charged, and this specifically includes the burden of
13 proving beyond a reasonable doubt the identity of the
14 defendant as the perpetrator of the crime with which
15 he stands charged. If after examining the testimony,
16 you have a reasonable doubt as to the accuracy of the
17 identification, you must find the defendant not guilty.

18 The probable truthfulness and believability
19 of every witness is for you, and for each of you to
20 decide; that I have already instructed you. The fact
21 that such witnesses come before you as Government agents
22 should not in the least change your attitude in this
23 respect. Their testimony does not deserve either
24 greater or lesser believability, simply because of
25 their official status.

1
2 Whether you do, or do not, believe any witness
3 must depend upon how truthful you judge that witness
4 to be after you have heard the testimony and formed
5 your own conclusions as to the witness' believability.

6 Evidence relating to any statement, or act or
7 omission, claimed to have been made or done by a
8 defendant outside of court, and after a crime has been
9 committed, should always be considered with caution
10 and weighed with great care; and all such evidence
11 should be disregarded entirely, unless the evidence in
12 the case convinces the jury beyond a reasonable doubt
13 that the statement or act or omission was knowingly
14 made or done.

15 A statement or act or omission is "knowingly"
16 made or done, if done voluntarily and intentionally,
17 and not because of mistake or accident or other
18 innocent reason.

19 In determining whether any statement or act or
20 omission claimed to have been made by a defendant out-
21 side of court, and after a crime has been committed,
22 was knowingly made or done, the jury should consider
23 the age, sex, training, education, occupation, and
24 physical and mental condition of the defendant, and
25 his treatment while in custody or under interrogation,

1 as shown by the evidence in the case; and also all
2 other circumstances in evidence surrounding the making
3 of the statement or act or omission, including whether,
4 before the statement or act or omission was made or
5 done, the defendant knew or had been told and under-
6 stood that he was not obligated or required to make or
7 do the statement or act or omission claimed to have
8 been made or done by him; that any statement or act or
9 omission which he might make or do could be used
10 against him in court; that he was entitled to the
11 assistance of counsel before making any statement,
12 either oral or in writing, or before doing any act or
13 omission; and that if he was without money or means to
14 retain counsel of his own choice, an attorney would be
15 appointed to advise and represent him free of cost or
16 obligation.
17

18 If the evidence in the case does not convince
19 beyond a reasonable doubt that a confession was made
20 voluntarily and intentionally you should disregard it
21 entirely. On the other hand, if the evidence in the
22 case does show beyond a reasonable doubt that a
23 confession was in fact voluntarily and intentionally
24 made by a defendant, you may consider it as evidence
25 in the case against the defendant who voluntarily and

1
2 intentionally made the confession.

3 Conduct of a defendant, including statements
4 knowingly made and acts knowingly done upon being
5 informed that a crime has been committed, or upon
6 being confronted with a criminal charge, may be
7 considered by the jury in the light of all other
8 evidence in the case, in determining guilt or innocence.

9 When a defendant voluntarily and intentionally
10 offers an explanation, or makes some statement tending
11 to show his innocence, and this explanation or
12 statement is later shown to be false, the jury may
13 consider whether this circumstantial evidence points
14 to a consciousness of guilt. Ordinarily, it is
15 reasonable to infer that an innocent person does not
16 usually find it necessary to invent or fabricate an
17 explanation or statement tending to establish his
18 innocence.

19 Whether or not evidence as to a defendant's
20 voluntary explanation or statement points to a
21 consciousness of guilt, and the significance to be
22 attached to any such evidence, are matters exclusively
23 within the province of the jury.

24 A statement or an act is "knowingly" made or
25 done if made or done voluntarily and intentionally, and

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2 not because of mistake or accident or other innocent
3 reason.

4 The jury will always bear in mind that the law
5 never imposes upon a defendant in a criminal case the
6 burden or duty of calling any witnesses or producing
7 any evidence.

8 The rules of evidence ordinarily do not permit
9 witnesses to testify as to opinions or conclusions.
10 An exception to this rule exists as to those whom we
11 call "expert witnesses." Witnesses who, by education
12 and experience, have become expert in some art, science,
13 profession, or calling, may state an opinion as to
14 relevant and material matter, in which they profess
15 to be expert, and may also state their reasons for
16 the opinion.

17 You should consider each expert opinion received
18 in evidence in this case, and give it such weight as
19 you may think it deserves. If you should decide that
20 the opinion of an expert witness is not based upon
21 sufficient education and experience, or if you
22 should conclude that the reasons given in support of
23 the opinion are not sound, or that the opinion is
24 outweighed by other evidence, you may disregard the
25 opinion entirely.

1
2 Where a defendant has offered evidence of good
3 general reputation for truth and veracity, or honesty
4 and integrity, or as a law-abiding citizen, the jury
5 should consider such evidence along with all the other
6 evidence in the case.

7 Evidence of a defendant's reputation inconsistent
8 with veracity, or honesty and integrity, or as a law-
9 abiding citizen, has not been discussed; or that
10 those traits of the defendant's character have not
11 been questioned may be sufficient to warrant an
12 inference of good reputation as to those traits of
13 character.

14 Evidence of a defendant's reputation,
15 inconsistent with those traits of character ordinarily
16 involved in the commission of the crime charged may give
17 rise to a reasonable doubt, since the jury may think
18 it improbable that a person of good character in
19 respect to those traits would commit such a crime.

20 The jury will always bear in mind that the law
21 never imposes upon a defendant in a criminal case the
22 burden or duty of calling any witnesses or producing
23 any evidence.

24 The law does not compel a defendant in a
25 criminal case to take the witness stand and testify,

1
2 and no presumption of guilt may be raised, and no
3 inference of any kind may be drawn, from the failure
4 of a defendant to testify.

5 As stated before, the law never imposes upon a
6 defendant in a criminal case the burden or duty of
7 calling any witnesses or producing any evidence.

8 There is nothing peculiarly different in the
9 way a jury should consider the evidence in a criminal
10 case, from that in which all reasonable persons treat
11 any question depending upon evidence presented to
12 them. You are expected to use your good sense;
13 consider the evidence in the case for only those
14 purposes for which it has been admitted, and give it
15 a reasonable and fair construction, in the light of
16 your common knowledge of the natural tendencies and
17 inclinations of human beings.

18 If an accused be proved guilty beyond reasonable
19 doubt, say so. If not so proved guilty, say so.

20 Keep constantly in mind that it would be a
21 violation of your sworn duty to base a verdict of
22 guilty upon anything other than the evidence in the
23 case; and remember as well that the law never imposes
24 upon a defendant in a criminal case the burden or
25 duty of calling any witnesses or producing any evidence.

1
2 If any reference by the Court or by counsel to
3 matters of evidence does not coincide with your own
4 recollection, it is your recollection which should
5 control during your deliberations.

6 Now, under your oath as jurors you cannot allow
7 a consideration of the punishment which may be imposed
8 upon the defendant, if convicted, to influence your
9 verdict in any way or in any sense enter into your
10 deliberations.

11 The duty of imposing sentence rests exclusively
12 upon the Court. Your function is to weigh the
13 evidence in the case and to determine the guilt or
14 innocence of the defendant solely upon the basis of
15 such evidence and the law.

16 You are to decide the case upon the evidence,
17 and the evidence alone, and you must not be
18 influenced by any assumption, conjecture, or sympathy,
19 or any inference not warranted by the facts until
20 proven to your satisfaction.

21 In reaching your verdict, you are not to be
22 affected by sympathy or antipathy for any of the
23 parties, what the reaction of the parties or of the
24 public to your verdict may be, whether it will please
25 or displease anyone, be popular or unpopular or

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2 indeed, any consideration outside the case as it has
3 been presented to you in this courtroom.

4 You should consider only the evidence --
5 both the testimony and the exhibits -- find the facts
6 from what you consider to be the believable evidence,
7 and apply the law as I now give it to you to those
8 facts. Your verdict will be determined by the
9 conclusion thus reached, no matter whom the verdict
10 helps or hurts.

11 Now, in this type of case there must be a
12 unanimous verdict, that means all twelve of you must
13 agree, and it goes without saying that it becomes
14 incumbent upon you to listen to one another and to
15 argue out the points among yourselves in order to
16 determine in good conscience whether your fellow
17 jurors' argument is one commensurate with yours or
18 whether at least you can with good conscience agree
19 with him. You have no right to stubbornly and idly
20 sit by and say, "I am not talking to anyone," "I am
21 not going to discuss it," because people with common
22 sense and the ability to reason must communicate, they
23 must communicate their thoughts. So, anything which
24 appears in the record and about which one of you may
25 not agree -- talk it out amongst yourselves and then

1
2 if you can't agree as to what is in the record, well,
3 you can ask the court to have that portion of the
4 testimony read back to you. You may do so by knocking
5 on the door and giving a note in writing to the
6 U.S. Marshal who will then present it to the Court,
7 and I will then bring you into the courtroom.

8 The foreman will preside over your
9 deliberations, and will be your spokesman here in
10 court.

11 The form of verdict will be guilty or not
12 guilty.

13
14 (continued next page)
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1 THE COURT: (Continuing) For your
2 deliberations I give you a copy of the indictment.
3 All of the evidence will be sent in to you except the
4 two coffee bags. And if you desire that those be
5 brought in, they may be brought in, too.

6 At this time, the alternate jurors, No. 1 and
7 No. 2 are discharged with the thanks of the Court.

8 Are they through?

9 THE CLERK: Yes, they are through.

10 THE COURT: You are through. Take your things
11 from the jury room and you may leave. The alternates
12 are discharged.

13 I will speak to the attorneys at side bar.

14 (Whereupon, the two alternate jurors retired
15 from the courtroom.)

16 (The following took place at the side bar.)

17 THE COURT: Exceptions to the charge.

18 MR. ASEN: Two, your Honor. On the charge
19 regarding recent and exclusive possession inference,
20 I believe it is the state of the law that if the jury
21 finds that there was an explanation to the possession
22 they must find that there is a possession. If
23 unexplained, then they may go further and infer guilt.
24 If there is an explanation, then the inference does
25 not fly. And, in fact, there would be no inference.

1 So that they would have to find there is an
2 explanation.

3 THE COURT: It's a question of fact for the
4 jury. I have your exception.

5 MR. ASEN: Well, the point I am making is that
6 your Honor did not indicate to the jury that they had
7 a right to find an explanation.

8 THE COURT: That's a question of fact for the
9 jury. From all the evidence, I am sure they can find
10 that.

11 MR. ASEN: Right. I agree. Except that in
12 indicating --

13 THE COURT: You have your exception.

14 MR. ASEN: Well, I am not making my point clear.
15 I am saying that the doctrine is the recent and
16 exclusive possession if unexplained. You did not
17 indicate to them that it included the if unexplained
18 portion. That's my point.

19 THE COURT: All right.

20 MR. ASEN: I have one other.

21 MR. TEITLER: May I be heard on that?

22 THE COURT: All right, it's in the charge. I
23 will leave it there.

24 What else?
25

1 MR. ASEN: Now, when we were talking about
2 out-of-court statements by the defendant, you ended up
3 indicating that they may use the statement against the
4 defendant. Well, in this particular case, the only
5 out-of-court statements are oral out-of-court state-
6 ments which are subsequent, exclusory statements,
7 which your charge covers. So it's fair that they use
8 the statement in favor of the defendant, except you
9 have charged out-of-court oral statements.

10 THE COURT: As to your first point, the law of
11 prima facie of guilt may be a controlling weight
12 unless explained by the circumstances or accounts in
13 some way consistent with innocence. That fully covers
14 what you are saying.

15 As to your other exception, it's directly from
16 the pattern. And I won't change it.

17 MR. ASEN: Except that the problem in this case
18 is there is no confession or admission being asserted
19 by the Government. That's why this extrajudicial
20 statement pattern would only apply. I am asking your
21 Honor to say in effect that if they find that there was
22 an out-of-court statement -- clearly there is in this
23 case -- then they can use it for the defendant or
24 against the defendant since the only person making
25 the statement is the defendant.

MR. TEITLER: Your Honor, just for the record,

I believe Mr. Asen asked for this particular charge
to be --

MR. ASEN: I offered a jury charge to his Honor
which was substantially different than the pattern
charge which I believe applies to the case. I didn't
ask for that charge.

(continued next page)

1 (Side bar discussion out of the hearing of the
2 jury continued:)

3 THE COURT: All right, you have your exceptions
4 on the record.

5 MR. ASEN: The other point I would except to
6 allowing the jury to take into the jury room the
7 indictment; as your Honor indicated an indictment is
8 not evidence and the jury should not have anything
9 that is not evidence.

10 MR. TEITLER: In listening to the charge on
11 reckless disregard of the truth, I did not hear the
12 word required by U.S. v. Bright, but unless the
13 defendant actually did not know it was stolen, and
14 perhaps my memory is not working, your Honor. I would
15 just ask that the Court, and in fact it is pro
16 defense, if you find that the defendant deliberately
17 closed his eyes --

18 THE COURT: Here it is.

19 MR. TEITLER: It is unless you find the
20 defendant did not actually know the goods were stolen,
21 and actually I am making the application pursuant to
22 some of the recent Second Circuit law.

23 THE COURT: Here, look at this.

24 This is what I am talking about.

25 I read this.

1 In other words, you may find, but it should be
2 unless, however, you find the defendant actually did
3 not know the goods were stolen, and I believe that is
4 how U.S. v. Bright is written and the Circuit has
5 been pretty picky about it.

6 In which case, you must acquit the defendant
7 and --

8 THE COURT: I will read all of that.

9 MR. TEITLER: I recognize the coffee bags are
10 very heavy and are the key items in evidence but the
11 U.S. Customs people can put them on the cart and take
12 them into the jury room.

13 THE COURT: They do not have to do that.

14 I will read this portion of it.

15 Anything else, Mr. Asen?

16 MR. ASEN: No.

17 THE COURT: Do you want the whole thing?

18 MR. ASEN: I will renew my exceptions that I
19 originally stated in your chambers.

20 THE COURT: All right. Do you want me to read
21 the whole thing?

22 Without reading the whole thing it makes no
23 sense.

24 (In hearing of the jury:)

25 THE COURT: There is small part I must read to

1 you of the charge and it gives an addition to something
2 which I read to you previously.

3 In other words, you may find the defendant
4 acted knowingly if you find that either he actually
5 knew he had received and possessed stolen bags of
6 coffee or that he deliberately closed his eyes to what
7 he had every reason to believe was the fact. Unless
8 you find that the defendant did not actually know, in
9 which case you must acquit the defendant.

10 Swear in the marshals.

11 (The marshals were thereupon sworn.)

12 THE COURT: All right, the jury may retire for
13 deliberations.

14 Mr. Teitler and Mr. Asen, come up, please.
15 Will you check out this evidence, Mr. Teitler, to see
16 it is all right?

17 * * *
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25

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
UNITED STATES OF AMERICA,

Plaintiff-Appellee

Docket No. 77-1194

-against-

AFFIDAVIT OF SERVICE

ROBERT A. RYAN

Defendant-Appellant
-----X

MICHAEL IRA ASEN, being duly sworn, deposes and says:

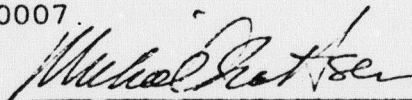
1. I am over the age of eighteen years, and not a party
to this action.

2. On May 27, 1977, I served the following papers:
NOTICE OF MOTION, AFFIDAVIT OF MICHAEL IRA ASEN, and ^{+ AFFIDAVIT} BRIEF/ON
APPEAL for the Appellant.

3. Service was effected by depositing the required copies
of each paper, first class postage pre-paid, in the United States
Mails at New York City, New York addressed as follows:

Stanley Teitler, Esq.
Assistant United States Attorney
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York, 11201

A. Daniel Fusaro
Clerk, United States Court of Appeals
for the Second Circuit
Foley Square
New York, New York 10007.



MICHAEL IRA ASEN

Sworn to before me
this 27th day of May, 1977.

LYNN A. MOSER
COMMISSIONER OF DEEDS